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In the Supreme Court of the United States.

OCTOBER TERM, 1927

GEO. O. RICHARDSON MACHINERY COMPANY, A CORPORATION, *Petitioner*,

VERSUS

MRS. ANNIE SCOTT, ADMINISTRATRIX OF THE ESTATE OF JOHN A. SCOTT, DECEASED, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF OF PETITIONER

DANIEL HADEN LINEBAUGH,
PAUL PINSON,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926

No. 988

GEO. O. RICHARDSON MACHINERY COMPANY, A CORPORATION, *Petitioner*,

vs.

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REPLY BRIEF *of* PETITIONER.

Respondent, in her brief, questions the right of this court to pass upon the federal question presented, because it is said the matter was not set up in the state court. We forbear to enter upon an extended discussion of this question. In addition to the suggestions contained in our original brief we however answer this contention by the following language in the case of *Boston Beer Co. v. Massachusetts*, 97 U. S. 24, 24 L. ed. 989, 991:

> "Some question is made by the defendant in error whether the point was properly raised in the state courts, so as to be the subject of decision by the highest

court of the state. It is contended that, although it was raised by plea, in the municipal court, yet, that plea being demurred to and the demurrer being sustained, the defense was abandoned, and the only issue on which the parties went to trial was the general denial of the truth of the complaint. *But whatever may be the correct course of proceeding in the practice of courts of Massachusetts, a matter which it is not our province to investigate*, it is apparent from the record that the very point now sought to be argued was made on the trial of the cause in the Superior Court, and was passed upon, and made decisive of the controversy, and was afterwards carried by bill of exceptions to the Supreme Judicial Court, and was decided there adverse to the plaintiff in error on the very ground on which it seeks a reversal.

"The Supreme Court, in its rescript, expressly decides as follows:

> 'Exceptions overruled for the reasons following:
>
> '*The Act of 1869, ch. 413, does not impair the obligations of the contract* contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as on individuals.
>
> 'The act is in the nature of a police regulation in regard to the sale of a certain article of property, and is applicable to the sale of such property by individuals and corporations, even where the charter of the corporation cannot be altered or repealed by the legislature.'

"The judgment of the Superior Criminal Court was entered in conformity to this rescript, declaring the liquors forfeited to the commonwealth, and that a warrant issue for the disposal of the same.

"*This is sufficient for our jurisdiction*, and we are bound to consider the question which is thus raised." (Italics ours.)

The case of *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760, is also in point. The first paragraph of the syllabus is:

"The true test of the jurisdiction of this court over state judgments is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided, and decided adversely to the federal right."

Quoting further from the opinion:

"The jurisdiction of this court over the judgments of the highest courts of the states is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution. Wherever rights acknowledged and protected by that instrument are denied and invaded, under the shield of state legislation, this court is authorized to interfere. The form and mode in which the federal question is raised in the state court is of minor importance, if, in fact, it was raised and decided. The Act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of a state, in suits 'where is drawn in question the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity.' Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. * * * *The true test is* not whether the record exhibits an express statement that a federal question was presented, but *whether such a question was decided, and decided adversely* to the federal right." (Italics ours.)

The opinion of the Supreme Court of Oklahoma contains the following language:

> "For reversal, it is first urged that the trial court had no jurisdiction to render the original judgment in said case for the reason that section 5442, *supra*, under which service of summons was had on the Secretary of State is in *violation of* Sec. 7, Art. 2 of the Constitution of Oklahoma, and *the 14th amendment to the Constitution of the United States*.
>
> "Counsel advance many arguments as to why said section should be held unconstitutional, but we are bound by the opinion in *Title Guaranty & Surety Co. v. Slinker*, 42 Okl. 811, 143 Pac. 41, wherein this court held that *said section does not violate the provisions of the State or Federal Constitutions* guaranteeing to such foreign corporation due process of law and does not deny it the equal protection of the law." (Tr., p. 225.) (Italics ours.)

We submit that this is a decision by the Supreme Court that section 5442, Compiled Oklahoma Statutes, 1921, does not violate the provisions of the Fourteenth Amendment to the Constitution of the United States. The question now raised "was decided, and decided adversely to the federal right."

Counsel cite the case of *American Railway Express Company v. F. S. Royster Guano Company*, 71 L. ed. [illegible], which is printed in Advance Opinions of this court, under date of March 15, 1927, page 458, wherein this court held valid the Virginia Statute for service on foreign corporations.

We call attention, however, to the fact that the Virginia Code (as quoted in the margin of that opinion), provides as follows:

> "The officer serving such process upon the chairman of the state corporation commission *shall immediately transmit a copy thereof, by mail to such corporation*, company, association, person, or partnership, and state such fact in his return."

It is because of the failure of the Oklahoma Statute to contain a similar provision that we assert it violates the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

DANIEL HADEN LINEBAUGH,

PAUL PINSON,

Attorneys for Petitioner

(15)

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Supreme Court of the United States

October Term, 1926.

GEORGE O. RICHARDSON MACHINERY CO., APPELLANT,

vs.

ANNIE SCOTT, ADMINISTRATRIX OF THE ESTATE OF JOHN A. SCOTT, DECEASED, APPELLEE.

On Petition for a Writ of Certiorari to the Supreme Court of Oklahoma.

BRIEF OF APPELLEE, RESPONDENT, IN OPPOSITION TO THE SAID PETITION.

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NO FEDERAL QUESTION ARISES ON THE RECORD.

Statement.

On June 1st, 1922, there remained of record and unsatisfied in the District Court of Oklahoma County, in the State of Oklahoma, a certain final money judgment rendered by said court on October 23rd, 1920, in favor of one John A Scott, plaintiff, vs Geo O Richardson Machinery Company, a corporation, defendant, the same based on service of summons under Section 5442, Compiled Laws

of Oklahoma 1921, as in such cases made and provided (Printed record herein, pages 13-15).

On said June 1st, 1922, said judgment debtor, appellant, and petitioner here, entered its general appearance in said cause, and sought and obtained the leave of the said court to file instanter (p. 202) its verified petition to vacate the said judgment (pp. 29-33), and to re-litigate with plaintiff the several items of alleged indebtedness embraced in his said judgment, and for affirmative judgment against him on open account in the sum of $29.10, its claim of defense being set up in an answer, and its counter-claim in a cross-petition, both attached as Exhibit "A" to said petition to vacate, and made a part thereof (pp. 33-41).

Scott, in open court, waived the issuance and service of summons required by statute in such cases, reserving the prescribed 20 days' time in which to plead to the said petition to vacate (p. 202).

On June 7th, 1922, Scott filed demurrer to said petition to vacate (p. 200), the first ground thereof being as follows:

"That the said petition does not state facts sufficient to constitute a cause of action, or to entitle defendant to the relief prayed, or to any relief, from the operation of the said judgment."

On June 13th, 1922, the trial court sustained the said demurrer, and the judgment debtor having refused to plead

further, its petition to vacate the judgment was dismissed (pp. 203-4). By appropriate orders embodied in the same journal entry of judgment, its exceptions were saved, and an appeal allowed to the Oklahoma Supreme Court.

Its appeal from the order denying its petition to vacate was duly lodged and perfected.

Only two assignments of error (p. 2) appear in appellant's petition in error in the Oklahoma Supreme Court, viz:

"(1) The court erred in sustaining the demurrer to the petition to vacate judgment filed by the plaintiff in error in the District Court of Oklahoma County, on June 1, 1922.

"(2) The court erred in dismissing the petition of the plaintiff in error to vacate judgment after plaintiff in error refused to plead further."

No matters in said cause were before the Oklahoma Supreme Court for decision, other than those covered by the above quoted assignments of error 1 and 2.

In a well considered opinion, the Supreme Court of the State of Oklahoma, on November 9th, 1926, affirmed the lower court (pp. 223-8), and on December 21st, 1926, denied to the plaintiff in error (the petitioner here) a rehearing of the said cause (p. 229).

Alleging (page 8 of its printed petition herein) the existence of a Federal question of substance in said cause, decided by the said State Supreme Court erroneously to its

prejudice, the appellant, petitioner herein, now asks for Writ of Certiorari for review thereof.

BRIEF AND ARGUMENT IN OPPOSITION.

No question is present, or possible in the instant cause, other than the sufficiency of the Appellant's petition to vacate the original judgment, challenged by demurrer.

Such question is solely of State judicature, unaffected by any matter of Federal character.

A consideration of the said Petition to Vacate (pp. 29-31) in its entirety, discloses that it is based on the 7th subdivision of Section 810, Compiled Oklahoma Statutes 1921, which provides:

> "The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made:
>
> . . . . . .
>
> "Seventh. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending."

All allegations in the Petition to Vacate, which bear upon or have to do with the question of "unavoidable casualty or misfortune" appear in paragraph 9 thereof (pp. 31-2), which reads as follows:

"(9) The defendant has a good and meritorious defense to each and every part of the plaintiff's alleged cause of action, and, if permitted to appear and answer herein, it could establish the facts as set out in Exhibit 'A', made a part of this petition, being an answer fully verified, which answer will be filed in this cause if this petition shall be granted. And this defendant alleges that had it known or had any intimation of the pendency of the action herein, it

would have appeared and defended, as it now appears and defends; and that the rendition of such judgment, without any kind or character of notice to this defendant, is a violation of its constitutional rights and is a great misfortune, unavoidable by this defendant, which prevented this defendnat from introducing its defense at the time the cause was tried."

The above is not a setting out of the facts constituting unavoidable casualty and misfortune, as requried by the statute but is merely a statement of the pleader's own conclusion of law, which, taken with other parts of the Petition to Vacate, is, that the failure of the Secretary of State to notify the foreign corporation that process for it had been served upon him, was the direct proximate cause of its own failure to receive actual knowledge of the pendency of the original action, prior to judgment, and, *ipso facto*, constituted "unavoidable casualty and misfortune", preventing its defense.

Clearly, such Petition to Vacate was demurrable, and the appellant, having refused to plead further, suffered its petition to be dismissed.

On appeal to the Supreme Court of Oklahoma, the one question alone was involved and decided, viz:

"Did the District Court of Oklahoma County commit reversible error in sustaining Scott's Demurrer to the Defendant's Petition to Vacate the Original Judgment?"

This question having been answered in the negative, the case is at an end; there being no question of Federal

nature involved, it is not for judicial cognizance by this Court.

While Section 5442, Oklahoma Compiled Laws 1921, was before the Oklahoma Supreme Court, and by it construed in connection with this case, it is only upon that feature which has a bearing on the question before it, viz: of "unavoidable casualty or misfortune", and not as to the feature of "process" provided for therein. All questions as to "process" had become finally settled in the trial court, and were in no way involved on appeal. Anything embodied in the first paragraph of the court's syllabus (p. 223), even if erroneous, is *obiter*, as affects the law and facts of this case.

For the reason that no Federal question is presented, the petition for review by certiorari should be denied, which is accordingly asked.

Respectfully submitted,

JEAN H. EVEREST,
CHARLES L. MOORE,
Counsel for Respondent.